Filed 3/13/07 P. v. Abujawdeh CA4/1
Received for posting 5/24/07

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. YOUSSEF ABUJAWDEH, Defendant and Appellant.	D047460 (Super. Ct. No. SCD188917)

APPEAL from a judgment of the Superior Court of San Diego County, Charles G. Rogers, Judge. Affirmed.

Pursuant to an agreement, Youssef Abujawdeh pleaded guilty to attempted murder (Pen. Code,[1] §§ 187, subd. (a), 664; count 1) and admitted he had personally inflicted

1 All statutory references are to the Penal Code unless otherwise specified.

great bodily injury (§ 12022.7, subd. (a)) during the commission of the offense.[2] In exchange, the remaining charges and allegations against Abujawdeh were dismissed with *Harvey* and *Blakely* waivers,[3] and the prosecutor agreed not to ask for a sentence more than 10 years. The trial court sentenced Abujawdeh to prison for 10 years, consisting of the middle term of seven years for the attempted murder plus three years for the great bodily injury enhancement.

Abujawdeh appeals, contending the trial court prejudicially erred in relying on two elements of attempted murder as aggravating factors in sentencing him to the middle term rather than a mitigated term. In the alternative, Abujawdeh claims his trial counsel was ineffective for failing to object to the court's consideration of those factors. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At about 1:00 p.m. on February 4, 2005, two loss prevention officers (LPO's) at Nordstrom in the Fashion Valley mall watched two young men and a female select men's clothing on the first floor before taking the escalator to the second floor and leaving the

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2 Abujawdeh also admitted the allegation under Welfare and Institutions Code section 707, subdivision (d)(1), that he was at least 16 years of age or older at the time the offense was committed.

3 Under the agreement, charges of second degree robbery and burglary and their attendant allegations of personal deadly weapon use and inflicting great bodily injury (counts 2 and 3) were dismissed with a waiver under *People v. Harvey* (1979) 25 Cal.3d 754, in addition to the dismissal of a deadly weapon use allegation with count 1.

Under *Blakely v. Washington* (2004) 542 U.S. 296, Abujawdeh further waived his right to a jury or court trial "as to any sentencing factors that may be used to increase his sentence on any count or allegation to the upper or maximum terms provided by law."

store carrying the merchandise which had not been purchased.[4] When LPO Donald Maes followed the youths outside and attempted to contact them, identifying himself as store security, one male and the female ran across the pedestrian bridge to the parking structure while the other male stopped. When Maes tried to handcuff the youth, a struggle ensued and both Maes and the young man fell to the ground. As they got back up, the youth removed a folding knife from his pocket and stabbed Maes three times in the back. Realizing he was hurt, Maes released the man, staggered toward the store, and fell to the ground. Witnesses called 911 as the young man fled from the scene.

Officers responding to the scene found Maes with life-threatening injuries. After Maes was transported to the hospital, the officers broadcast a description of the male suspect who stabbed Maes, which was provided by a witness and also the license plate number of a car in which he and the other suspects were believed to have fled. Police officers responding to the car's registered owner's address at around 2:20 p.m., found the car at the residence and took all three suspects into custody as they walked out of the residence's garage. Abujawdeh was identified as the male who had stabbed Maes.

Abujawdeh, who was 17 years old at that time, was charged in a felony complaint as an adult along with the other male, and the female was charged in a juvenile proceeding, for crimes arising out of the incident at Nordstrom. Abujawdeh's codefendant pled guilty to second degree burglary and Abujawdeh pled guilty to attempted murder involving great bodily injury as noted above.

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4 Because Abujawdeh pled guilty, the basic facts of the crime are summarized from

At sentencing, after announcing it had read the presentence report prepared by the probation department, as well as the statements in mitigation and aggravation, the court invited counsel to comment on the matter.

The prosecutor argued the court should impose an upper "range" of 10 years because Abujawdeh had tried to kill Maes by stabbing him three times with a pocket knife with a three-inch blade which caused the victim's lung to collapse and injuries to his kidneys and other internal organs.[5] Maes then addressed the court, outlining his severe injuries and the lasting effects of the stabbing on him both physically and emotionally.

In support of a lower term sentence, counsel[6] for Abujawdeh stressed his youth, remorsefulness, irrational fear of what his father would do to him for stealing, and his being under the influence of drugs at the time of the offense as mitigating factors. Counsel refuted alleged circumstances in aggravation that the crime involved a high degree of cruelty or that it was planned, conceding only that the petty theft of clothing had been planned by Abujawdeh and his friends. Acknowledging Abujawdeh was not eligible for parole, counsel asserted that in addition to Abujawdeh's youth and remorsefulness, the facts he had pled guilty at an early stage, had no criminal record, was nonviolent before the instant offense, had the support of a large family, and was not predisposed to committing the crime weighed in favor of a mitigated term. Counsel

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the probation officer's report.

[5] Although the People represent on appeal that the probation department recommended an upper term, the report shows it recommended the middle term of seven years plus three years for the great bodily injury enhancement.

[6] Two attorneys appeared for Abujawdeh at the sentencing hearing.

referred to the report of a psychologist who had evaluated Abujawdeh to note that Abujawdeh had an open attitude toward treatment, was amendable to drug counseling and that the incident had strengthened his family ties. Counsel argued Abujawdeh should only be given a lower term, five-year sentence because the mitigating factors far outweighed the aggravating facts.

The court then specifically questioned counsel on what it considered were conflicts between the information Abujawdeh had given the probation officer and the information he had given the psychologist regarding his drug usage (type and frequency) and his acceptance of responsibility and remorsefulness because of his explanation of how Maes received his injuries. After counsel explained such discrepancies, Abujawdeh personally apologized in court to Maes for the incident and his injuries.

After listening to the above, the trial judge stated:

> "I would like to begin by thanking all counsel for the way this case was approached. The submissions that I've received from all counsel are outstanding. This is a difficult case . . . in part because of this young man's youth and the existence of circumstances that arguably make him less equipped to respond appropriately to circumstances such as confronted him. It's also difficult because the facts involve grave and callous violence. [¶] . . . [¶] Mr. Abujawdeh stands before the court at age 18. . . . The first sentencing choice that the court has to address is one that I think is addressed initially by the statutes. And that is whether he is eligible for probation. The statute says that this offense makes him ineligible. I so find probation is not appropriate. Probation is denied."

The judge then turned to the question of the appropriate term of punishment in this case, explaining that the attempted murder offense involved a sentencing range of five, seven or nine years, and the section 12022.7 enhancement, if imposed, "would add three

years to whatever term was imposed." After further explaining his duty to consider the aggravating and mitigating circumstances concerning the crime and the offender in deciding which of the three ranges should be imposed here, the judge stated:

> "One has to imagine that there are some attempted murders that deserve the low term. There are some that deserve the presumptive mid term. And some that deserve the upper term. [¶] . . . One might imagine that an attempted murder that is committed impulsively, albeit with the requisite intent, which we know doesn't require any particular units of time be formed, by someone who is youthful and immature and who may lack capacity to appreciate the choices that he's making and the consequences of those choices, perhaps impaired by drugs to enhance that, and who has no record and who makes a full and complete acceptance of responsibility -- that starts to sound like a mitigated case. [¶] [However,] I think the court has to make a qualitative, as well as a quantitative, analysis. We don't just count the factors and see whether there are more on one side of the equation or another. We have to weigh them. [¶] This young man is youthful. . . . He, I don't think, intended to kill anybody when he went to Nordstrom's that day. [He] intended to steal. [¶] The only evidence about [drug] usage . . . comes from Mr. Abujawdeh. But I'm happy to accept that that may have been a factor here. [¶] . . . However, long-term drug abuse, I think, is -- even by a young person -- an aggregate, as well as a mitigant, given the repeated decisions that are made to ingest the substances. [¶] The offense itself was committed, I think, impulsively. But let's think of what this involves. It was interesting to me to see that Mr. Maes is not much bigger than Mr. Abujawdeh would have been at the time. . . . Mr. Maes looks fit, but he's not a large man. He was doing what he does every day in his life. And that is contact people and tell them he thinks they have some merchandise they haven't paid for. Let's step back into the store and talk about it. [¶] The reaction was initially a struggle. The two of them go to the ground. Mr. Abujawdeh then, in some fashion, gets a knife out of his pocket, opens it and stabs Mr. Maes three times. He then flees. Yes. This was an impulsive act, but it was not one wholly lacking in clear intent to kill. [¶] I think his striking -- that he didn't, as so many people do, take out the knife and brandish it or say back off, or display it or slash and then run. [¶] Instead, his response was three stabbing blows, even if those three blows were in a frenzy. This is not, I don't think, mitigated conduct."

The trial judge additionally found Abujawdeh's statements to the probation officer, "as to how this event occurred, to be highly disturbing" and indicative of the type of person Abujawdeh was. Although the judge acknowledged Abujawdeh's statements of remorsefulness to the psychologist, to alternate sentencing and to Maes in court, he found that when Abujawdeh was "interviewed a month or so after his plea was entered by a probation officer, he seem[ed] to have forgotten his lines and advance[d] an explanation that is grossly self-serving and wholly at odds with any acceptance of responsibility."

Looking at all of the factors "wholly apart from the seriousness of the injuries," the court found "that the aggregates and the mitigants are at best a wash." The court noted there was no way it could conclude, "even given this young man's youth, that this is a mitigated case under these circumstances. The court therefore chooses the midterm of seven years, with respect to [count 1] that was admitted." The court then exercised its discretion to imposed the three-year enhancement under section 12022.7 for the near-death injuries Maes received due to Abujawdeh's violent outburst.

After announcing its decision that Abujawdeh serve a total term of 10 years in prison and addressing the issue of restitution and credits, the court asked whether either party had any other requested conditions of the judgment. The court thereafter granted defense counsel's request that Abujawdeh be recommended for "the Right Turn Program" at the Richard J. Donovan Correctional Facility, and informed Abujawdeh of his right to appeal.

DISCUSSION

I

STATEMENT OF REASONS FOR SENTENCE

Abujawdeh claims his sentence should be reversed because the trial court prejudicially erred in relying on two elements of attempted murder, i.e., his intent to kill and his completion of a direct, but ineffectual, act toward the commission of the crime, as aggravating factors in sentencing him. He asserts this claim is not waived on appeal even though he did not object below to the court's reasons because there was no "meaningful opportunity to object." (*People v. Scott* (1994) 9 Cal.4th 331, 356 (*Scott*).) We find these assertions meritless.

Although our Supreme Court in *People v. Gonzalez* (2003) 31 Cal.4th 745 (*Gonzalez*), in reaffirming the waiver rule articulated in *Scott, supra,* 9 Cal.4th 351, that a defendant may not challenge a court's discretionary sentencing choices on appeal if he has failed to object during the sentencing hearing, stated that the better practice for sentencing courts is to clearly give the parties an opportunity to object by first announcing the proposed sentence and its reasons for the sentence, and also advise the parties that they are entitled to object and if their objections are meritorious that it would alter the sentence appropriately (*Gonzalez, supra,* at p. 755), the high court did not make such statements requirements. Rather, the court in *Gonzalez* explained that sentencing issues are waived where the court gives the defendant an adequate opportunity to raise an objection or to seek a clarification or a change in a sentence "at any time during the sentencing hearing. . . . The court need not expressly describe its proposed sentence as

'tentative' so long as it demonstrates a willingness to consider such objections. If the court, after listening to the parties' objections, concludes that its proposed sentence is legally sound, it may simply state that it is imposing the sentence it has just described, without reiterating the particulars of that sentence. . . . [¶] It is only if the trial court fails to give the parties any meaningful opportunity to object that the *Scott* rule becomes inapplicable." (*Gonzalez, supra*, 31 Cal.4th at p. 752.) The court held that the parties in *Gonzalez* were offered a meaningful opportunity to object even in the absence of a tentative sentence and advisement regarding objections because after the sentence was imposed, the defendants objected and the court entertained those objections without being told they were untimely or impermissible. (*Id*. at p. 755.)

Here, as in *Gonzalez, supra*, 31 Cal.4th 745, the sentencing record reflects the parties were offered a meaningful opportunity to object. As shown above, after stating it had read the probation report and statements in mitigation and aggravation of sentence, the court carefully listened to the arguments of counsel, even questioning defense counsel on several of the claimed mitigating factors. After denying probation and stating reasons for not imposing a lower or upper term, the court imposed a middle term sentence on count 1. After the court completed imposition of sentence and discussed restitution and other matters effecting the judgment, the court asked whether counsel had "other requested conditions of the judgment on behalf of Mr. Abujawdeh?" Counsel raised one issue relating to programs for Abujawdeh in prison, but did not raise any objections to the court's statements of reasons for imposing the midterm sentence on count 1.

Because there is no indication on this record that defense counsel was precluded from either objecting to the court's reasons as they were stated or at the conclusion of the hearing when the court asked for any further requests, we cannot find that Abujawdeh's counsel were denied the opportunity to object to the sentence imposed. Abujawdeh has therefore waived his claim of sentencing error on appeal. (*People v. Davis* (1995) 10 Cal.4th 463, 552.)

Moreover, even if the issue were not waived, it is without merit. A trial court generally has broad discretion to tailor a sentence to a particular case. (*Scott, supra*, 9 Cal.4th at p. 349.) Where the penal statute provides for three possible terms of punishment for a particular offense, the court is required under the Determinate Sentencing Law (DSL) to impose the middle term unless "imposition of the upper or lower term is justified by circumstances in aggravation or mitigation," which are shown by a preponderance of the evidence, and the circumstances in aggravation outweigh the circumstances in mitigation for an upper term or the mitigating factors outweigh those in aggravation for a lower term. (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420(a) & (b).) Because the middle term is the statutorily presumptive term for any offense with three possible terms, once the court has stated reasons for denying probation, the court may impose the middle term of imprisonment without stating any additional reasons. (*People v. Lobaugh* (1987) 188 Cal.App.3d 780, 785-786 (*Lobaugh*).) In other words, the DSL does not require the court to "state reasons for imposing the middle term of imprisonment as distinguished from the upper or lower term." (*People v. Arceo* (1979) 95 Cal.App.3d 117, 121; § 1170, subds. (b), (c); Cal. Rules of Court, rule 4.420(e).)

In this case, despite the absence of any court rule, statutory mandate or case law, the court stated reasons for imposing the middle term, explaining why it found certain purported mitigating factors not established by a preponderance of the evidence and why those that were so established were balanced by the established aggravating factors so that no deviation from the presumptive middle term was warranted. However, because Abujawdeh does not challenge the court's reasons for denying probation and the court had no obligation to state reasons for imposing the middle term, Abujawdeh's claim of error in those reasons confers no right to relief on appeal. (*Lobaugh, supra*, 188 Cal.App.3d at pp. 785-786.)

II

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

In the alternative, Abujawdeh contends that if we find an objection was necessary to preserve his sentencing error claim, then his trial counsel acted ineffectively for failing to object below. We disagree.

When faced with a claim that defense counsel has provided ineffective assistance at trial, "[w]e presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial [and sentencing] decisions." (*People v. Holt* (1997) 15 Cal.4th 619, 703.) The burden is on the defendant to show both " 'that [his] counsel's performance fell below an objective standard of reasonableness; *and* . . . that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these

components, the ineffective assistance claim fails. Moreover, " 'a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.' [Citation.]" ' [Citation.]" (*Ibid*.)

Here, as noted above, the law is clear that no statement of reasons was necessary for the court to impose the presumptive middle term sentence in this case. Therefore, no reasonably competent attorney would have raised an objection to the court's reasons for imposing such term, which essentially showed its weighing process of the purported mitigating and aggravating facts and finding "a wash."

Further, because the record contains no explanation for defense counsels' failure to object to the court's reasoning for the sentence imposed, and the law provides a satisfactory explanation for the lack of such objection, we reject Abujawdeh's claim of ineffective assistance of counsel on appeal. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 784, quoting *People v. Pope* (1979) 23 Cal.3d 412, 426.) Abujawdeh simply has not shown a prima facie case of ineffective assistance of counsel on this record.[7]

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[7] By separate order we also deny Abujawdeh's petition for a writ of habeas corpus in case number D048813 based on the same claim of ineffective assistance of counsel.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

O'ROURKE, J.